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The Press and its Privileges

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by

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Contents.

The printing press may justly be-
called the great invention of mod-
ern times. The potency on mankind,
public opinion, its education of the
masses, its great and wonderful
power for uplifting the com-
mon people, all combine to make
it an object of fear to those who
dread the full, fair and free criti-
cism, which is now recognized as
the just and rightful possession of
the press. The range of usefulness
is unlimited. It covers every
line of thought and business the
possessor of journals of its every
religion finds its most powerful
ally in the publication devoted to
its dissemination, art bows its
head to the comments of the press
and the modern sciences man-
would be indeed a very rea-

there, from of the opportunities and
valuable assistance rendered by
that dumb creature and still speaks
with unstinting fairness of the
good and bad alike.

The history of the rise of the
press is truly the history of modern
civilization, reflecting, as it does in
an unsurpassed manner, the
struggle for liberty and freedom
of thought. Look for a moment
upon one of the modern daily
newspapers of our best civilization,
and compare it with the crude
efforts of the eighteenth century.
The older publication contained
only a short and unsystematized
account of the local happenings
this of to-day teems with news
from the most distant parts of
the earth, from its fellow

educator, the telegraph. Every department of art, every profession, every business has its column. The best minds of the day write its pages as a means of presenting their thoughts to mankind, and the shrewd and unerring politician in no way despises the means it offers of advancing his schemes. Bold, fearless, it comments upon all with impartial judgment, sparing none who rightfully may be deemed subject to criticism.

Turn, if you will, to a country which yet hangs back upon the verge of universal liberty and see its condition. You see censors of the press, whose duty it is to tone down or obliterate in its visit any criticism of government. Nothing is allowed contrary

to the recognized authority upon religion, politics, or Philosophy, "however laudable may be the design and however virtuous the motive", even the Bible itself, the guide and light of the Christian world, being forbidden to the people. Freedom of intercourse of mind with mind is truly the palladium of modern liberty. Can any one doubt the influence of the press, "the reflector of public opinion"?

Let us take a brief survey of the struggle for the freedom in our Mother Country, ere we turn to it in our own land which boasts of constitutional liberty, of speech, religion and the press. An examination of the common law will show that liberty of the press was far from being recognized. [illegible]

were placed around it which a [illegible]
chief form of Government considered
essential, deeming the press an
agent for evil rather than for good
and considering itself the judge
of what ought to be published
In England, after the Reformation
no book could be published with-
out the approval of the royal
censor The notorious Star Cham-
ber published its regulations in
Mary's reign, strictly limiting the
number of presses and of men,
and allowing only the Stationers
Company to operate presses
Elizabeth, too, confined printing
to London Cambridge and Ox-
ford, the entire subject being
controlled by the censor, the Arch-
bishop of Canterbury The temper
of the authorities is well shown

by the case of one Stubbe, a Puritan who wrote a pamphlet addressed to Elizabeth, remonstrating upon her proposed marriage with the Duke of Anjou. This writing "very far from being a virulent libel is written in a sensible manner and with unfeigned loyalty to the queen," yet he lost his hand as a punishment. The act of 23 Eliz. ch 2 (1581) was aimed at the writings of the seminary priests. This act made it a capital felony "to write, print... any book containing any false or seditious matter to the defamation of the Queen's Majesty, or encouraging any insurrection in the realm". The same restrictions are found in the Star Chamber act of 1637 which limited the number of printers to twenty (20), each being al-

loved two presses, the penalty for illegal printing being pillory, whipping and imprisonment.

Books could neither be reprinted without a new license nor brought from abroad unless examined in London. The case of Leighton (State Trials III, 883) is an interesting one. One Leighton, having been found guilty of publishing a scurrilous book, entitled an "Appeal to Parliament or Sion Plea vs. Prelacy," was fined £10,000, degraded from orders, set in the pillory, deprived of one ear, his nose slit and one cheek branded S.S., a somewhat more severe punishment than was times admit of. Prynne's case in Brodie's History of the British Empire (II, p 334) is another good illustration of the times

Yet it was in these stormy days that we find the "Weekly News" of May 23d. 1623, seeking public favor and attention. The destruction of the Star Chamber opened the doors of the printing houses, from which issued forth a deluge of political pamphlets and newspapers. May, in his Constitutional History of England (II. p. 247) estimates that no fewer than 80, 000 of these appeared from 1640 to the Restoration.

The Long Parliament in its endeavors to restrain royalists and prelatical writers by most tyrannical ordinances called forth Milton's celebrated Areopagitica, "a speech for liberty of unlicensed printing" in which he pleaded "for liberty to know, to utter

and to argue freely, according to conscience above all other liberties."
It was a wonderful conception of the right liberty of days to come.

The act of 1662 was the next legislation, confining printing to London and the Universities of Oxford and Cambridge. The penalty for illegal printing was hanging and quartering, with the pleasant diversion of days spent in the pillories beforehand. This act was allowed to expire in 1679. The next year however the court with Chief Judge Scrogge at its head in Carr's Trial (7th State Trials 529) declared it to be criminal at common law to publish anything concerning government, whether true or false, of praise or of censure. "If you write any-

thing of the Government, whether in terms of praise or censure, it is not material, for no man has a right to say anything of the Government," a decision not overruled until 1765 by C. J. Camden in Entick v Carrington (St. Tr. XIX 1074). All newspapers were stopped, except the two Government publications, the "London Gazette," which consisted of news without comments and the "Observator," containing comment without news. During this period the coffee-houses assumed their great popularity, people using them as convenient gathering places for the exchange of news and the discussion of questions of the day. The last attempt at censorship of the press occurred in 1695, but

the House of Commons negatived it, and from that time it ceased to exist, although the question of its revival was repeatedly agitated in Parliament, as is seen by a paper of 1703, entitled "Reasons against restraining the press," and in 1729 by a bold pamphlet styled "Letter to a Great Man concerning the Liberty of the Press."

From this time we find the press theoretically free, subject only to the restraint of the Stamp duty, removed in 1861, and the law of libel. The size, however, was restricted till 1826. With these restrictions removed, the newspapers began to thrive. The first daily, "The Daily Courant" being published in 1709. In Queen Anne's time, they assumed their present

form, combining news with political discussion, and yet, even in her reign, it is said to be a well established fact that the House of Commons exercised a censorship of the press. Harmless publications were called libel and innocent authors were prosecuted, such men as Steele, Defoe, Fleetwood, suffering from these unwarranted attacks upon the press. (Lecky, Hist of Eng. 8th Cent I, 458)

Yet the government professed for many years to forbid the publishing of matter concerning public officers and their administration of affairs considering them offences against good order.

Like restrictions can be found in the history of the American Colonies. Massachusetts was compelled by the people in 1649

to publish the laws, hitherto deemed best kept away from the people, in order that they might remain in ignorance of the exact line between allowed and prohibited actions. "Licensers of the press" were appointed in 1662, who had the pleasure of prohibiting the publishing of the "Publick Occurrence" (1690), the first paper published in the New World. Books were burned when found to be "offenders against good order." Bancroft speaks of the burning of Milton's book in defence of unmixed principles of popular freedom (2 Bancroft 73). Hildreth, in his History of the United States (Vol II, p. 298), says that Governor Shute and the legislature, having become involved in a quarrel, tried in

vain to have the printer punished for printing a remonstrance, & failure probably resulted in the future free publication of state documents. The state printer of Va. in 1682 was arrested for publishing Assembly laws and thrown into prison to await the action of the king, who declared there should be no printing in the colony. Only twenty years before, Sir Berkeley of the same colony, was thankful that he was not bothered with free schools and printing presses, calling them "breeders of disobedience, heresy and sects."

In 1692 New York obtained its first printing press, the result of the flight of a printer from Philadelphia who had been accused of having published an address in which Quakers were

charged in holding office with "inconsistency in exercising political authority" while professing the principles of the Revolution. "As late as 1779 the "imprimatur" of the Mass Bay Colony licenser, is found and the licensers only gradually ceased to exercise their functions, (Thomas Hist of Printing in America I 207-8) The turbulent days [illegible] to the Revolution, and the independent tone of American manufactures made the home government fear to allow the free and unrestricted use of the printing press at least to the same extent as in the old country. Once only in our days of national independence has the attempt been made upon the liberty of the press. The famous or rather infamous Sedition Law of 1798

was that attempt, and it was a most unpopular act, under which very few convictions were made, and died a natural death three years later & was declared unconstitutional from the first, and was deemed a blow at national independence, a free press being considered the highest and best safeguard of a free and independent people. Judge Cooley says (Const Law p 348): "Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to see that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their tendency and fairness."

The Constitution of the United States (1st Amendment) provides, among other things that "Congress shall pass no law abridging the liberty of the press" What is meant by this has been the subject of much discussion among text writers Cooley in discussing the question (Con. Lim. p. 415) says: "It is to be observed of these amendments (first ten) that they recognize certain rights as existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged or that they remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed" Tiedeman (Lim. of P. P. p. 4), "It has accordingly become a constitutional principle

that every citizen may publish what he sees fit, being responsible for abuse of that right" Blackstone says (Comm. 151). "The liberty of the press ... consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has the right to lay what sentiment he pleases before the public, to forbid this is to destroy the freedom of the press," but he adds, "he must take the consequences of his own temerity," and he concludes "so true will it be found that to censure licentiousness is to maintain the liberty of the press." Junius, bitter as he was against established doctrines, yet says: "The liberty of the press is the palladium of all civil, political,

and religious rights of an Englishman,"
and also "the laws of England
provide as effectually as any human
laws can do, for the protection
of the subject in his reputation. If
the characters of private men are
insulted or injured, a double reme-
dy is opened to them by action and
by indictment." Story (§ 1880)
says: "It is plain that the language
of the amendment imports no more
than that every man shall have
the right to speak, write and print
his opinion without prior restraint,
provided he does not injure anyone
in his rights or disturb public
peace." He further deems it
"neither more nor less than an
expansion of the great doctrine
recently brought into operation into
the law of libel that every man

shall be at liberty to publish what is true with good motive and justifiable ends." Nor can the threatened publication of a libel be restrained by injunction (see the state of La. Monroe 34 La Ann. 744) where it was declared that it would establish a complete censorship over the press to enjoined. "Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely muzzled and its just influences upon public opinion entirely paralyzed. Such powers do not exist in courts and they have been constantly disclaimed by the highest tribunals of Europe and America."

The point was discussed and sustained in People vs Crosswell 3 Johns C. 315 (see Com. V Blanding 3 Pick 304

313, Com. v Clap. 4 Mass. 163.) In this case also came up the question as to intent of defendant and whether the publication was libellous or not, and whether the defendant can give the truth in evidence. The last point discussed was: Are the jury to decide on the law and the fact? An evenly divided court with an opinion for the upholding of these views by Chief Justice Kent led to the passage of Chap 90 of laws of 1804 Sec 28, which has been copied substantially into the constitution of the states of the Union. This article gives to every man the right to speak or to write whatever he pleases, being responsible for the abuse of that right. In all criminal prosecutions, the truth

shall be received in evidence to the jury. If the matter is true and published with good motives and for justifiable ends, the party shall be acquitted and the jury shall have the right to determine the law and the fact. It is to be found now incorporated into the State constitution of 1846 Art. 1 §8. In striking contrast to the modern doctrine that the truth is a defence is the old Common law saying in Criminal cases: "The greater the truth, the greater is the libel." (Rex v Dean of St. Asaph 21 St Trial 847)

We see from the foregoing that the Libel laws of our various states are the only restrictions at present upon the press. A discussion of them separately would lead us far beyond the limits of this paper. Our attempt, briefly, will be to see what are the rights, duties and liabilities of newspapers at the present time.

What is a libel?

Many attempts have been made to define it, but they are all more or less unsatisfactory. A fair sample of attempt is Jeremy Bentham's: "A libel is anything, published upon any matter, of any body, which any one was pleased to dislike". In People v Croswell (supra), Mr. Hamilton, who has been often quoted since, gave a clear and fairly comprehensive

definition, as follows:- "A libel is a censorious or ridiculing writing, picture or sign made with a mischievous and malicious intent towards government, magistrates or individuals."

One better suited to our purpose is that given by the N.Y. Penal Code, (§ 242), which at the time of the revision was said to be declaratory of the common law, being based upon Blackstone (IV. 150), Kent (II. 16) and the Indian Penal Code. It is:- A malicious publication by writing printing, effigy, sign or otherwise than by mere speech, which exposes any living person or the memory of any person deceased to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause, any person

to be shunned, or avoided, or which has a tendency to injure any person, corporation, or association of persons, in his or their business or occupation."

The test is whether in the mind of an intelligent man, the terms of the article and the language used import a criminal charge. (Moore v. Bennett, 48 N.Y. 472.)

Privileges and Obligations of the Press.

It is the privilege and duty of the press to discuss freely all that relates to the health, (25 La. An. 178) welfare and progress of the people, but it must not abuse the privilege. This privilege accorded to journalists and reporters in writing and commenting upon current public affairs is no defence to an action for libel, if it affirmatively appear

to have been used as a means of gratifying malice (Hart v. Townsend. 67 How Pr. 88.). So in Foster v Cripps, (39 Mich. 380) it is said, that whatever functions a journalist performs are assumed and performed under the same responsibility attaching to other persons. And he must defend himself upon the same legal ground, when he abuses his right to publish comments upon any subject. (Bronson v. Bruce, 59 Mich, 467).

This liability extends to all concerned - the writer, proprietor, printer and even to the news agent who participated in the publication. In Fry v. Bennett (28 N.Y., 324) it was held that the editor and proprietor is presumed to have knowledge of the contents of his paper, and this is true

when the proprietor is absent and the paper in charge of an agent to whom he gave express instructions not to publish anything exceptionable, personal or abusive, brought in by the author of the libel (Dunn. v Hall, 1 Ind., 344). But tho' a publisher may be liable for an article clearly libellous, yet it is not so when he is not shown and cannot be presumed to have known that the article was intended to have an injurious effect and meaning. (Caldwell v Raymond, 2 Abb. Pr. 193.)

While there is a joint and several liability among all who participate, if one be compelled to pay damages, he cannot force contribution from another who might have been sued jointly

with him, there being "no contribution among wrong doers". Where a proprietor was convicted and fined for a libellous article inserted without his knowledge, it was held that he had no right of action against the editor who inserted it (7 C.R. 232).

Nor can he take security to be indemnified against the consequences of an illegal act, as in publishing a libel, the promise being void, tho' renewed after the publication of the libel (Atkinson v. Johnson, 43 Vt. 78).

And should he publish a false communication tho' giving the name of the author, he would still be liable in damages to the parties who consider themselves aggrieved. (Perrett v. N.O. Times, 25 La. An. at 173).

"We regard the doctrine as no longer controverted that the publication of any communication, with or without the name of the author, which is defamatory and false, subjects the publisher as well as the author to damages in favor of the party aggrieved. Circumstances may be shown in mitigation of damages. The law looks to the animus of the publisher in permitting his columns to be used as a vehicle for the dissemination of calumny, whereby the fair character of an individual may be blasted and his business pursuits ruined. The law implies malice in the publisher from the act of publishing the libel, not malice in the sense of spite, antipathy or hatred towards the party assailed, but

the evil disposition, the malus animus which induced him wantonly, recklessly or negligently, in disregard of the rights of others to aid the slanderer in his work of defamation by the potent engineery of the public press, written or printed slander being justly considered more pernicious than that uttered by words only." In this case the libel was published as a card, paid for, with an accompany statement that the editor disclaimed all responsibility. The disclaimer did not save him from a judgment of $5,000.

That the proprietor is responsible for advertisements has been decided in many states. Robertson v Bennett, (44 N.Y. Sup.Ct. 66) turns on the point that the proprietor is responsible for

everything appearing in his paper, citing Huff v. Bennett, (4 Sand. 120) as authority.

We have seen from the quotation from Perrett v. N. C. Times (supra) that malice of a peculiar kind is inferred. But actual malice is not essential unless the communication is a privileged one. It may be shown to increase or diminish damages. And while it is true that the proprietor is responsible tho' he knew not of the publication, still he may show that he has acted with reasonable care in the selection of his assistants and then he cannot be compelled to pay punitive damages. (Littlejohn v Greeley, 13 Abb. Pr. 41.) and (McArthur v. Detroit Daily Post, 16 Mich 447.) In the latter case an article alleged

to be libellous was copied into defendants paper from another, and was preceded by a statement that it was so copied. Tho' it was selected without the knowledge of defendant by one in his employ, it was deemed a published libel, the fact of re-publication rendering it none the less so. (Sanford V. Bennett. 24 Hun, 20.).
While it is no justification that the article is copied yet the defendant may show it in mitigation of damages (Hewitt & Pioneer Co., 23 Minn., 178.)
But one who first publishes a libel cannot be held responsible for re-publication of it by others. (Burt vs. Adv. Co 28 N.E. (Mass) 1.

From what has been said, it might be inferred that anything published bearing heavily upon a

man renders the proprietor liable under all circumstances. Such is not the case, however, and the exceptions, or as they are called-

Privileges of the Press.

will be considered next and more at length.

A newspaper has no more freedom of discussion than a private citizen (Sweeney v Baker 13 W. Va. 158). Matters of public interest can be discussed in its columns but it must be done bona fide and without malice or anything beyond what is necessary for public discussion. (Wilson v Reed, 1 F & F, 149)

Just what "public interest" has been much discussed. In Rane v. Walters (11 Fed. Rep. 689) it is said - Perhaps the right of legislative interference may

be taken as a fair test of the right of public discussion since they both depend upon the same condition

Pollock in his work on Torts. (p 221) says that what is open to public comment is a question of "judicial common sense rather than technical definition" and proceeds to put them into two classes. I Those of interest to the common mind as for example, affairs of persons in authority. II. Those laid open to the public by the voluntary act of the person concerned — a book or picture placed upon the market. Under the first class, we have certain rights placed in a separate class of its own — the rights of Judicial and Legislative proceedings.

In these cases the press is given protection and the presumption that the libel is prompted by malice does not apply; and if made in good faith and parity there is no responsibility.

The New York Penal Code (§244) says:" The publication is excused when it is honestly made in the belief of its truth and upon reasonable grounds for this belief and consists of fair comments upon the conduct of a person in respect of public affairs or upon a thing which the proprietor thereof offers or explains to the public".

Reports of Judicial Proceedings

In furnishing a full, fair and true report of judicial proceedings, the newspaper is entitled to absolute privilege and is not punishable except where there is proof of actual malice (Salisbury v. Union & Ad. Co., 45 Hun, 120). The reason for the rule is laid down in Thompson v. Powning (15 Fed. 202), where it is said "the public have a right to know what takes place in a court of justice and unless the proceedings are of an immoral, blasphemous or indecent character or accompanied with indecent observations or comments, the publications privileged"

The old decisions stand on the ground that courts of justice

are open to the public (Stoddale v. Howard, 9 A. & E. 212)

In Dowley v. Pulsifer, (137 Mass. at 394) Holmes, J. says "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest importance that those who administer justice should act always under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode a public duty is performed."

The power of the court to restrict the publications of proceedings is granted in some instances

for example, till the termination of the trial, and the court will have power to punish as a contempt of court a disregard of what has been ordered. (Bishop on Criminal Law II. §259.) This power has been held to extend to the punishment of all who took part in the publication, when, in the opinion of the court, the matter tended to corrupt the source of justice or diminish the influence of the courts.

New York has legislated upon this subject as follows (Penal Code §143) No one is to be punished for a full fair and true report of any trial or proceeding had in court.

When the matter contained in the report is blasphemous or obscene, the privilege does not attach. A celebrated case upon this point is Rex v. Mary Carlile (3 B. & Ald. 167) where the defendant was found guilty of libel in publishing an account of the trial of Richard Carlile, who had read the whole of Paine's Age of Reason to the jury upon his trial. Mary incorporated the whole book into her report and the judges declared that the privilege did not extend to such a colorable reproduction as the proofs showed that to be.

New York's Code of Civil Procedure (§ 1907) is indicative

of the state law." Cn action, civil or criminal cannot be maintained against an edetor, reporter ---- of a newspaper for the publication therein of a fair and true report of any jiudicial, legislatiie or other public and official proceeding, without proving actual malice in making the report.

What is meant by a fair and true report?

In Salisbury v. Union + Ad. Co., (supra), it is stated that it need not be verbatim nor embrace the entire proceeding; but it was further held that the suppression of parts of testimony as to defamatory would destroy the privilege.

The suppression of the

testimony of one witness may render the whole report unfair. Duncan v Thwaites (3 B. & C. 581.), So where a trial extends through several days, daily reports will be protected but all comments on the case must be suspended till the proceedings terminate (Lewis v Levy, E. B. & E. 537)

While the report, if substantially correct and written by one regularly employed, is presumed to be in good faith, yet if sent by an outsider, with a fair account, it is not privileged and if malice is shown the author is liable. Stevens v Sampson, 5 Ex D. 53)

This privilege of communication extends to all courts even to justice of the peace, if held

with open doors and the pro-
cedure is not ex parte. The con-
trary was held in England till
the case ex Neil v. Hales (3 C.P. Div. 314)

The doctrine has not been
adopted by all the states, Stanley
v. Webb, (4 Sandf. 21) and Gazette Co.
v. Timberlake (11 Ohio St. 548) bring
to the contrary. These cases, how-
ever, are strongly criticized in
McPee v Fulton (47 Ind. 403)
which holds that the privilege
extends to preliminary examina-
tions which are ex parte by consent
of the accused. Stanley v Webb
cannot be considered as authar-
ity in this state now, as it was
decided before the enactment
of § 1917 of the Civil Code (supra.
Ackerman v. Jones (3 Ill. Sup Ct. 42)

a more recent case holds that a fair and true report of an ex parte affidavit presented to a police magistrate is privileged as a judicial proceeding and no action could be maintained thereon by a party, who, tho' named in the affidavit, was not the party arrested under the warrant so obtained. (See also Pisell v Press Co. 11 Mo. S. 393).

If the proceeding is ex parte and results in the discharge of the prisoner, the report is privileged. But a report of paper filed before suit, is not so considered as a petition in a divorce suit before action begun. (Barber v. St Louis Dis. Co., 3 Mo. Ap. 377).

A petition filed during vacation

not yet presented to court, asking for the disbarment of an attorney and containing allegations which are actionable unless justified is likewise not privileged (Cowley v Pulsifer, 137 Mass 396). And if a paper publishes reports that a breach of promise suit is about to be begun against a man, it is liable for it has a tendency to disgrace the person and bring him into ridicule (Mowry v. Journal Co., 25 R.I. 161)

Nor does the privilege extend to Grand Juries reports. In re Pabe v Cauldwell (18 Abb. Pr. Rep. 377) it was held that such proceedings are not "proceedings before a judicial body" and that the law of 1854, Ch. 130 relating to privileged com

communications did not apply.

Nor are statements made by a justice of the peace as to what had been said before him and which did not appear in any affidavit privileged (McDermott v. Corning Journal, 43 N.J. 488).

What has been said so far relates to the publishing of reports. Let us look for a moment upon the effect of comment or criticism of them.

Odgers in his work on Libel (*p. 259) says "The reporter must add nothing of his own. He must not state his opinions of the conduct of the parties or impute motives therefor. Above all he must not insinuate that a particular witness committed perjury. That is

not a record of what occurred".
Such comments may often be justified on the ground of bring matter of public interest. In Andrews v. Chapman, (3 C. & K., 288), it is said "If any comments are made, they should not be a part of the report - and the two things should be kept separate".
The intermingling of comment destroys the privilege and renders it actionable. (Pittock v. O'Neill, 63 Pa. St. 253)
And where a criticism that it was infamous was added to a report of a verdict by a jury, it was held to be shorn of its privilege and an action could be maintained by any one of the twelve jurors, the defense that it was against a class being held not good.

(Byers v. Martin, 2 Colo. 605.)

The N.Y. Code of Civil Procedure (§ 1908) declares that privileges shall not extend to anything not said and done in the course of the trial or to anything added by way of comment, including in the latter the "headlines" of the article. That the addition of comments destroys the privilege was decided in this state in 1811, by the celebrated case of Thomas v Croswell, (7 Johns. 264). But see Johns v Press Co. (19 N.Y.S. 3.)

A report may be fair and impartial yet owing to the heading placed upon it become libellous. In Valcott v Hall (6 Mass. 514) the heading was "Shameless Conduct of an

attorney" thus destroying the privilege. Again in Edsall v. Brooks (17 Abb Pr. Rep 221), "Blackmailing by a Policeman" was declared a libel regardless of what the article itself contained.

An attorney while conducting a trial is allowed absolute privilege as to what he may say (save contempt of court). He may villify whom he pleases if in course of duty. But the same privilege does not extend to the reports of the trial published by the papers. The paper is responsible for all scandalous matter that it may publish and it cannot urge as a defence that it is a true report of the trial

Legislative Acts.

What has been said concerning judicial privilege applies to legislative reports of committees, however, where the bodies sitting with closed doors. And where a report of proceedings of a committee appointed to investigate certain affairs is published, the report is privileged. The reason assigned being that the committee has been given power to hear and determine matters submitted to its jurisdiction by the voluntary consent of its members. (Below v Aren, 63 Texas, 722, citing Cooley on Con. Lim. 448)

In 1869 the Supreme Court of Louisiana held that a newspaper was not liable for publishing testimony of witnesses given before a legislative investigating committee.

It is now recognized that the privilege extends to all investigations held by legislative bodies, where the newspaper has acted in good faith by publishing a fair and true report.

Public Officers and Candidates

It has been said that if a man desires to know what a villian he is, as well as his utter lack of morals and intellect, it is only necessary that he offer himself as a candidate for a public office. While the above is putting it rather strong, there is no doubt that we are subject to this kind of comment, the severity of the press verges on facetiousness.

Nothing is truer than that full and fair discussions of men's

qualifications for office, or his acts in an official capacity, are allowable and should be privileged. Reasonable criticism is necessary to inform the electors as to their candidates. And the candidate undoubtedly makes himself a species of public property, into the qualities of which every one has a right to enquire, and of the fitness of which every one has a right to judge and give an opinion. The ordeal of public scrutiny is many times a disagreeable and painful operation but it is the result of freedom of speech which is the necessary attribute of free government. (Mynett v Richardson, 1 W.W.H. (S.C.) 348). Yet is true that at least in the heat of political campaigns much is written

that is libellous. The opinion seems to exist among journalists that the surest way to elect their chosen candidate is to vilify his opponent. Such an error of opinion is slowly being corrected by the payment of thousands of dollars as balm to wounded reputations.

The true rule as to limit of criticism is stated by Craig, J. in Pearick v Wilcox (81 Ill. 781) when he says. "While the qualifications and fitness of a candidate for office might be properly discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libellous article in a news-

paper, not intended to get a election may be attended with excitement and feeling that not unfrequently enter into an election."

Townshend on Libel and Slander (p. 532) says that in order to bring matter from out the law of libel when written concerning candidates for office, it must have probable cause and be without malice; it must be as to the candidate's capacity, or the fitness of the candidate in relation to the office he seeks and be addressed to those who exercise the elective franchise or hold the appointative power. (see cases cited in § 135, idem)

Again in Kelly v. Sherlock L. R. 1. Q. B. 689), it is said that whoever fills a public position renders himself open thereto. It must accept

an attack as a necessary, tho' unpleasant adjuncdage to liberty.

The law as to criticism of this kind varies in the different states, many of them, however, following the English rule. The right to censure public men is of recent development in that country. The present century has brought forth many changes which can best be shown by an extract from the famous case of Mason v. Walter (L.R. 4. Q.B. 94), "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory form. The full liberty of the press to comment on the conduct and motives of public men has only in very recent times been recognized. Comment on Government, on members of both

Houses of Parliament, on Judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, altho' injustice may often be done, and tho' public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus fully brought to bear on the discharge of public duties."

In England whatever private acts as tend to show unfitness for public office may be published along with fair comments on public acts

(Seymour v. Butterworth, 3 F. & F. 372).

Which is qualified by Gathercole v. Miall (15 M. & W. 319), where the rules laid down that such comments must not extend beyond these public acts.

(Cooper v. Lawson) express an opinion as to acts already performed, even to the extent of inferring motives for them. But the publication of false charges with comment on them is not within the pale of privilege.

(Davis v. Shepstone, 11 Appeal Cases, 187)

While discussing unfitness the English rule allows full sway as to mental qualifications.

American View

Time will not allow an extended examination of American decisions, yet it will be necessary to examine a few of the leading cases and

from them deduct what we may call a liberal rule.

In New York, a narrow rule was early announced in the case of King v. Root (4 Wend. 114), where Lieut-Gov. Root, a candidate for re-election was charged with drunkenness while officiating as the presiding officer of the Senate. The defense that it was a privileged communication was declared not a good one and the dependant being unable to prove to the jury's satisfaction that the charges were true, a verdict of $1,400 was given for the plaintiff. The court laid down the rule that it is only safe to permit editors to publish what they please in relation to character and qualifications of a candidate, holding them responsible for the truth of what

they publish. An honest belief in the truth of the charge is not considered a defense. The same view was taken in the case of Gov. Lewis against Col. Fenn (5 Johns. 135), the libel being a set of resolutions published in a report of a public meeting held to protest against the re-election of Lewis.

Most of the cases in recent years have shown a tendency to get away from the strict line of distinction between criticism and false accusation, this doctrine being substantially the same that applies to all persons public or private.

It has been criticized in many decisions, and Judge Cooley (On Torts, pp. 536-540) takes issue with the New York courts. But the recent cases being

the State nearer the English doctrine.
Hunt v Bennett (19 NY 173). Where the
office was an appointative one was
a case of privilege, the communication
being made to the appointing officer.
The court intimated that if the office
be an elective one, a publication of
charges would likewise be privileged.
The most important case in this
state is Hamilton v Eno (81 NY. 116),
cited approvingly in 123 NY. 432.
Here it is declared that the official
acts of public men may be freely
criticised and the occasion will
excuse everything but actual malice
and evil purpose in the critic; but
the occasion will not of itself excuse
an attack upon the character and
motives of the officer. The truth of
what is published only will excuse

the publication.

Again, it is not privileged to charge one holding a public office with an offense. And if false, the publisher is liable, however good his motives, altho' the acts are done in the discharge of his official duty.

In Copeland v Express Co (64 Tex. 354), the early U.S. doctrine was severely criticized, a comparison being made with the English decisions, holding the latter to be "well founded in reason and more nearly in accord with constitutional liberty and free republican institutions" The Texas court held it to be a "sound principle and one supported by authority, that where a person consents to become a candidate for public office conferred by popular election, he should be considered as putting his character in issue,

so far as respects his qualifications for that office."

West Virginia has gone to the other extreme, holding that where the statements relate to the mental or physical qualifications of a candidate, whether they are false or true, inspired by good or bad motives, they are allowable. Yet when it comes to moral fitness they cannot be excused (Sweeny v. Baker, 13 W. Va., 159).

In State v. Balch (31 Kan. 472), the doctrine is laid down that if the article published circulates only among the voters of the district and only for the purpose of giving what the defendant in good faith, believed to be true, in order to enable the voters to cast their ballots more intelligently, then such publication was privileged, notwithstanding

the fact that portions were untrue and damnaged the character of the candidate. This is certainly too broad and leaves a wide open door to abuses of person which even the position of the libelled person should not tolerate. The true rule is undoubtedly that no one "has a right by publication to impute to such a candidate, falsely, crimes, or publish allegations affecting his character falsely."

Michigan takes a decided stand upon this question. In Wheaton v. Beecher, (33 New Rep 503) the court held that to allow false charges of a defamatory character to be privileged as matters of law, when made in good faith, was most pernicious having a tendency, and a strong one at that, to deter sensitive

but capable men from accepting nominations for elective positions.

The leaning toward a liberal rule is strikingly seen in the Minnesota cases. Aldrich v Press (9 Minn. 138) lays down the broad doctrine that there is no privilege for defamatory assertions made against public candidates and that the newspaper stands on the same footing as private individuals.

Marks v. Baker (28 Minn. 162) asserts that where the plaintiff was a candidate for re-election and was charged with having failed to account for certain funds, that though the charge was untrue, it was nevertheless privileged if made in good faith. So decided upon the ground that free discussion as to fitness of candidates for elective offices is essential to good government

"The fact of one's being a candidate for an office often affords a license or legal excuse for publishing language concerning him, as such candidate, for which publication there would be no legal excuse did he not occupy the position of such candidate."

In a recent case in Michigan (Belknap v Ball, 83 Mich 683), a newspaper printed a coarse and illiterate "copy" of a pretended written statement alleged to have been written by the candidate for office. In its decision the court said:- Public journals are in the performance of a high duty when they truthfully place a charge before the public. Disqualification to hold the office cannot therefore be made the test to determine the libellous character of the

publication. Criticism is, in libel cases, a censure of the conduct or character of the person criticized. In becoming a candidate, a person lays himself open to it, and the criticism may be according to the taste of the author provided he does not depart from an honest regard for the truth, a wide range being allowed.

Within this limit, newspapers may express opinions and criticize the character, habits, morals and mental capacity of the candidate for the position sought; yet no one will deny that a candidate's character and reputation should be protected from malicious attack, even tho' wide range is given to the press.

In Crane v. Walters (10 Fed. R. 620), a much cited case, Lowell, C. J. announ-

ced as the modern doctrine "that the
public has a right to discuss, in good
faith, the public conduct and
qualification of a public man
with more freedom than they may
take with a private matter. In such
discussions they are not held to prove
the exact truth of their statements,
provided they are not actuated by
express malice and there is reason-
able ground for their statements
or inferences, all of which is for
the jury".

An early Michigan case, Foster
v. Scripps (supra) adds as a reason for
holding the press liable for falsehood;
that the public might be deprived
of the services of a good man - and
thus harm result not only to him
privately but to the public - an

argument, is well worth considering.

The Maryland rule is a broad one and was early announced in Negley v Farrow (60 Md. 158) Robinson, J. in the course of his decision said "But there is a broad distinction between a fair and legitimate discussion in regard to the conduct of a public man and the imputation of corrupt motives by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives, he must do so at his peril; and must either prove the truth of what he says, or answer in damages to the party injured." The court further

held that the paper was in duty bound to inform the plaintiff's constituents of his political acts; that if the publishers made reasonable enquiries as to what they published in honest belief of its truth and they further thought that the vote as given, and upon which the criticism was founded, proceeded from the corrupt business relation, they were privileged in stating such opinion through the columns of their paper.

An examination of Banner Pub. Co. v Slate (16 Lea, 176) discloses the fact that Tennessee has adopted a much to be condemned rule.

In this case a vigorous denunciation of state prison officials was published. The court held that

neither the press nor private individuals has a right to discuss the character or conduct of officers or candidates for office, without being liable, civilly and criminally, for defamatory utterances published even when made upon probable grounds and free from malice.

In striking contrast to the above doctrine is the rule as stated in Briggs v. Garrett (111 Pa. St. 404)

Judge Briggs, a candidate for re-election was falsely charged in a letter read at a public meeting, and published in full the next day, with having rendered a $200,000 steal possible through his charge to the jury in the case. The court said in non-suiting him, that in the absence of malice, it was pro-

legal, tho' the charge was false and he had not delivered the charge referred to.

The Rule Stated.

An examination of the decisions discussed and the cases there cited leads to the opinion that when a man becomes a candidate he puts his character and fitness for the position in issue; and that anything legitimately relating to them may be regarded as influencing the minds of the voters and therefore privileged.

The publisher is not responsible for accuracy of statements or inferences, unless he is guilty of express malice or such negligence that he may be deemed to have had malice; and that there

statements, tho' false and defamatory, when made upon probable cause honestly believed in, and for the public good - the very essence of the privilege - will not be ground for prosecution. But the publisher must not overstep the bound to gratify spite or publish where the occasion does not demand it. If he does so, he is liable, this bring a question for the jury.

Criticism where Public Patronage is sought.

We come now to the last division of the subject as treated in this paper. But a short space will be devoted to it as the law is practically well settled.

Criticism of this kind has to do

only with the thing which bids for public attention, not its author and does not go beyond the work or thing done. So when it is within the line of legitimate comment of that which forms the occasion of it, it is deemed privileged.

The harshness or strength of the criticism is not taken into consideration.

The general rule is that whoever seeks notoriety or invites public criticism to himself or his merits challenges to that extent public criticism and cannot complain or resort to the courts, should that comment be more severe than he anticipated.

While such criticism is privileged, it ceases to be so when the critic goes outside and attacks the character or motives of the person whose work is

criticised, just so far as he goes outside, to that extent it loses its privilege and the burden of proving the truth of his assertions is upon him. (Campbell v Pattes-woode, 3 F. & F. 857).

This is terribly put in the charge to the jury in Reade v Lacaster, 6 Ad. & El. (N.S.) 959 note), where the rights of the critic are thus laid down:- "The critic can say of the player that 'he mouths his speech as many players do', or that 'he saws the air too much with his hand', or that he 'tears a passion to tatters, to very rags, to split the ears of the groundlings'; but he cannot abuse him as a "robustious periwig-pated fellow" and recommend that he should be 'whipped for o'erdoing Termagant'." See also Fry v. Bennett, 28 N.Y. 324).

The artist bringing forth his

productions from the studio must not complain unless his character or motives are questioned. (Whistler v. Ruskin, London Times, Nov. 26, '78). And the hard working author is alike a fair target so far as his personal character are drawn into question. (Cooper v Stone, 24 Wend. 434).

The book or other production can be called vulgar, or the critic may say it is immoral or pernicious and it will still be protected, the line being drawn sharply at the point of the vices or motives of the author.

But the modern tendency is to allow the publication of any inferences that may be found by the jury to be reasonably drawn from the thing or act criticized.

If a man bids for public patronage to an exhibition, any fair comment on his performance is privileged. The leading case on this point is a somewhat recent one, a criticism of that famous imposition, the "Cardiff Giant", being the bone of contention. In the course of the opinion, Gray, C.J. said "The editor of a paper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner the subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice - - - -

which malice may consist either in direct intention to injure, or in a reckless disregard of another's rights and of the consequences that may result to him". Gott v. Pulsifer, 122 Mass. 235.

It is likewise the privilege, & not the duty, of the press to have any imposition on the public and where a man claims to have discovered a new system of any kind and seeks patronage, he cannot recover damages for adverse criticism unless inspired by malice

There is no need of multiplying specific examples of this rule. Suffice it to say that it is through public comment that a thing's popularity becomes possible and should it not reach the required standard, there is no inherent right

resting in any one to complain of its failure and seek damages from another for voicing what he honestly thinks concerning it.

The world progress through comment. Its advancement is due to the courageous position taken at critical times by its leaders, who, without fear of consequences, declare what they believe to be the best and truest safeguard of the nation

The press wielding a powerful influence, reaches every home in our broad land. Its unparalled opportunities for moulding the character of the nation enjoins it with a high and solemn duty to use its every effort in the right direction.

But the struggle for preferred

has led to evils which must and should be corrected. Newspaper enterprise, so called, has brought about such a condition of things that even a man's private affairs are not safe from the perseverance of reporter. The most sacred relations are ruthlessly paraded before the public. Sensationalism runs rampant and the most spicy scandals are relied on to fill the pocket of the proprietor.

How shall this be corrected? There is more to be feared from an undue restriction of the press than from the other extreme. The people, strong in their independence will resent, and rightfully too, any attempt to limit the power of the press. But it can

hardly be doubted that the innate good sense of right and wrong will fail to rebuke any paper which goes too far in the other direction.

One thing is true - the law of libel has not developed in proportion to the wonderful advance of the press. The law stands today practically upon the same footing as it did years ago: while every day sees progress in the newspaper world.

The courts, with their much to be admired - tho' oftimes to be deplored conservatism have failed to take judicial notice of this development. Since they refuse, there is one way left - the law making branch must

be invoked. A thorough revision of the law would put it where it belongs in the light of our increased knowledge of the press. Till then it behooves editors to bide their time, showing themselves law respecting citizens whose voices and pens are ever to be found on the side of right and justice. In them, to a marvellous degree, lies the future progress and success of our country.

Finis.